Res-Care, Inc., d/b/a Hillview Health Care Center *and* United Food and Commercial Workers Union, Local No. 896, chartered by United Food and Commercial Workers International Union, AFL–CIO. Case 14–CA–15503

April 14, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on November 13, 1981, by United Food and Commercial Workers Union, Local No. 896, chartered by United Food and Commercial Workers International Union, AFL–CIO, herein called the Union, and duly served on Res-Care, Inc., d/b/a Hillview Health Care Center, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 14, issued a complaint on November 27, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on October 19, 1981, following a Board election in Case 14–RC–9444,[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about November 6, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so.[2] On December 2, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

January 15, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 21, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice To Show Cause, Respondent admits its refusal to bargain, and that it refused to supply the Union with certain requested information, but denies that it thereby violated Section 8(a)(5) and (1) of the Act. Specifically, Respondent attacks the Union's certification on the basis of the following: The collective-bargaining unit under which an election was held in Case 14–RC–9444 was inappropriate for any purpose; the Union improperly gained a majority of the votes cast in the election through its objectionable conduct and that of certain supervisory personnel of Respondent; and the Regional Director for Region 14 erroneously decided to open and count one of the challenged ballots, and to certify the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit. Respondent urges, therefore, that said election and subsequent certification were without legal effect. Also, Respondent requests that the entire record in Case 14–RC–9444 be incorporated into the record in this case and that a hearing be held on the entire matter, contending that the Board's response to its original request for review was inadequate.

Counsel for the General Counsel contends that with respect to all issues Respondent is attempting to relitigate the identical issues that were raised and determined by the Board in the underlying representation case. The General Counsel further contends that Respondent has violated Section 8(a)(5) of the Act by failing and refusing to provide certain requested information to the statutory representative of its unit employees. We agree.

A review of the record herein, including the record in Case 14–RC–9444, shows the following: On July 9, 1981, the Regional Director for Region 14 issued a Decision and Direction of Elections.[3]

[1] Official notice is taken of the record in the representation proceeding, Case 14–RC–9444, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] The complaint contains allegations of a general refusal to bargain and that Respondent has failed and refused to provide the Union with certain requested information which is necessary for, and relevant to, the Union's carrying out its statutory obligations as the exclusive bargaining representative of Respondent's employees in the unit found appropriate.

[3] The Union also sought to represent a separate unit of service and maintenance employees in Case 14–RC–9460. Since the Employer con-

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Thereafter, Respondent filed a timely request for review of the Regional Director's Decision and Direction of Elections, contending that the Regional Director directed an election in an inappropriate unit. By telegraphic order of August 4, 1981, the Board denied Respondent's request for review as it raised no substantial issues warranting review. On August 6, 1981, an election by secret ballot was conducted among the employees in the appropriate unit. The corrected tally of ballots showed that, of approximately 11 eligible voters, 3 cast ballots for, and 3 against, the Union; there were 5 challenged ballots, a number sufficient to affect the results of the election.

On August 10 and 13, 1981, the Union and Respondent, respectively, filed timely objections to conduct affecting the results of the election. After a regional investigation of the challenged ballots and objections, the Regional Director, on September 3, 1981, issued his "Supplemental Decision and Order of Severance and Certification of Results of Election, and Order Directing Hearing and Order Consolidating Cases and Notice of Hearing" in which, in Case 14–RC–9444, he, *inter alia*, sustained the challenges to four ballots and overruled the challenge to the remaining ballot and ordered that it be opened and counted, and that a revised tally of ballots issue. The Regional Director also overruled Respondent's objections in Case 14–RC–9444 in their entirety. Having overruled Respondent's objections in that case, the Regional Director ordered that, if the revised tally disclosed a majority for the Petitioner, a certification of representative should issue. If, however, the revised tally disclosed that the Petitioner did not receive a majority, the Regional Director ordered that the issues raised by the Petitioner's objections would be resolved by a hearing, in which event Cases 14–RC–9444 and 14–CA–15083, a case involving a related unfair labor practice allegation, would be consolidated. Finally, the Regional Director ordered that Case 14–RC–9444 be severed from Case 14–RC–9460.

On September 15, 1981, Respondent filed a request for review of the Regional Director's supplemental decision. By telegraphic order of October 7, 1981, the Board denied Respondent's request for review as it raised no substantial issues warranting review. Pursuant to the Regional Director's supplemental decision, the challenged ballot was opened and counted, and it resulted in a majority of valid votes being cast for the Union. A revised tally of ballots and a Certification of Representative issued October 19, 1981.

By letter, dated October 30, 1981, the Union requested that Respondent bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. Also, by letter[4] dated October 30, 1981, the Union made the following request for information:

> The Local is . . . requesting to be supplied with the following information . . . the names, date of hire, average hours of work each week and current rate of pay for each of the employees in the bargaining unit for which we will be negotiating, along with the cost the employer pays for the Health insurance for each of the employees, and the eligibility requirements for participation in your current insurance plan.

By letter dated November 6, 1981, Respondent responded to the Union's request, described above, stating, *inter alia:*

> This is to . . . receipt of your letter of October 30, not received by us till quite recently. Please be advised that we must refuse all demands made in your letter until such time as it has been legally determined that your alleged representative status is a valid one. It is our position that any certification obtained by your union among any group of employees is not valid and we believe in good faith that we will prevail in this respect. So until such time as our position is tested in the courts, we must refuse to meet with you, although we do not believe this will ever be necessary.

Respondent's answer to the complaint and its response to the Notice To Show Cause are limited in all essentials to repeating its contentions urged but rejected in the representation proceeding, i.e., because of the alleged union misconduct set forth in its objections, and the Regional Director's error in overruling the challenge to one of the ballots, the Union was not properly certified and therefore its refusal to bargain with the Union was not unlaw-

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tended that the only proper unit was one which included the service and maintenance employees as well as the licensed practical nurses, the petitions in Cases 14–RC–9444 and 14–RC–9460 were consolidated and heard in one proceeding. In his Decision and Direction of Elections, the Regional Director determined that separate units of service and maintenance employees and licensed practical nurses are appropriate. The unit found appropriate in Case 14–RC–9444 is:

> All full-time and regular part-time technical employees including licensed practical nurses employed by the Employer at its Vienna, Illinois, facility, EXCLUDING all service and maintenance employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

[4] While the complaint allegations would indicate that two letters were sent, Respondent's answer of November 6, 1981, refers to only one letter. Whether the Union's demand was in one letter or two is immaterial. Respondent admits that both the demand for bargaining and the demand for information were made. Its admitted response demonstrates that it was refusing both demands.

ful.[5] It thus appears that Respondent is at this time attempting, as the General Counsel contends, to raise again issues which were specifically considered and resolved by the Regional Director and the Board in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Res-Care, Inc., d/b/a Hillview Health Care Center, a Kentucky corporation with its principal offices and health care facility located at 514 Eleventh Street, Vienna, Illinois, the sole facility involved herein, is engaged in providing nursing home care and related services. During the past 12 months which period is representative of its operations, Respondent derived gross revenues in excess of $100,000 from the operation of its nursing home and purchased and received goods valued in excess of $5,000, which goods were shipped directly to Respondent's Vienna, Illinois, facility from points located outside the State of Illinois.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

United Food and Commercial Workers Union, Local No. 896, chartered by United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time technical employees, including licensed practical nurses employed by the Employer at its Vienna, Illinois, facility, EXCLUDING all service and maintenance employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On August 6, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 14, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on October 19, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 30, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit, and to provide certain requested information necessary for, and relevant to, the Union's performance of its function as an exclusive collective-bargaining representative of the employees in the above-described unit.

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[5] Respondent also denies that the information requested by the Union described above is necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative. It is well-established Board law that information as requested herein, i.e., the names of the employees in the bargaining unit, date of hire, rates of pay, copies of fringe benefits programs currently in effect for unit employees, including copies of the policies, and the cost of the policies to the company, is presumptively necessary for, and relevant to, the performance of its function as the exclusive collective-bargaining representative of the unit employees. *Fremont Manufacturing Division, The Oil Gear Company, Inc.*, 259 NLRB 355 (1981); *Belcor, Inc., d/b/a Franciscan Convalescent Hospital*, 256 NLRB 510 (1981). Respondent has not stated any basis for not supplying the information other than its assertion that it has no obligation to bargain because the certification is invalid. We therefore find that Respondent had no valid basis for refusing to supply the Union with the requested information.

[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(g).

Commencing on or about November 6, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union, and to provide the Union with the information requested by it for the purpose of collective bargaining.

Accordingly, we find that Respondent has, since November 6, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and has refused to furnish the Union with information necessary for and relevant to, the purpose of collective bargaining and that, by such refusals, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

Further, we shall order that it make available to the Union forthwith the following information: the names, date of hire, average hours of work each week, and current rate of pay for each of the employees in the appropriate bargaining unit, along with the cost Respondent pays for the health insurance for each of the employees, and the eligibility requirements for participation in Respondent's current insurance plan.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Res-Care, Inc., d/b/a Hillview Health Center is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers Union, Local No. 896, chartered by United Food and Commercial Workers International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time technical employees, including licensed practical nurses employed by the Employer at its Vienna, Illinois, facility, excluding all service and maintenance employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 19, 1981, the above-named labor organization has been, and now is, the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 6, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By refusing on or about November 6, 1981, and at all times thereafter, to provide requested information necessary for, and relevant to, the Union's duties as statutory bargaining representative in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusals to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Res-Care, Inc., d/b/a Hillview Health Care Center, Vienna, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Food and Commercial Workers Union, Local No. 896, chartered by United Food and Commercial Workers International Union, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time technical employees, including licensed practical nurses employed by the Employer at its Vienna, Illinois, facility, EXCLUDING all service and maintenance employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Refusing to furnish requested information relevant to and necessary for the purpose of collective bargaining to United Food and Commercial Workers Union, Local No. 896, chartered by United Food and Commercial Workers International Union, AFL–CIO, as the exclusive bargaining representative of Respondent's employees, in the appropriate unit described above.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Supply forthwith the aforesaid Union the names, date of hire, average hours of work each week, and the current rate of pay for each of the employees in the bargaining unit set forth above, along with the cost Respondent pays for the health insurance for each of the employees, and the eligibility requirements for participation in Respondent's current insurance plan.

(c) Post at its Vienna, Illinois, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Food and Commercial Workers Union, Local No. 896, chartered by United Food and Commercial Workers International Union, AFL–CIO, as the exclusive representative of our employees in the bargaining unit described below.

WE WILL NOT refuse, to the United Food and Commercial Workers Union, Local No. 896, chartered by United Food and Commercial Workers International Union, AFL–CIO, as the exclusive bargaining representative of our employees in the unit described below, to furnish requested information relevant to and necessary for the purpose of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and condi-

tions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time technical employees, including licensed practical nurses employed by the Employer at its Vienna, Illinois, facility, excluding all service and maintenance employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL supply forthwith to the aforesaid Union the names, date of hire, average hours of work each week, and the current rate of pay for each of the employees in the bargaining unit set forth above, along with the cost we pay for the health insurance for each of these employees, and the eligibility requirements for participation in our current insurance plan.

RES-CARE, INC., D/B/A HILLVIEW HEALTH CARE CENTER